Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

SYED ASAD,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the U. S. District Court lacked jurisdiction under 28 U.S.C. Section 1332(a)(1) (diversity) since International Business Machines Corporation ("IBM") is a citizen of California, in that California is IBM's largest profit center, California probably now has IBM's largest property holdings in the world, California ranks number four with respect to the number of employees employed by IBM compared to other states, IBM regularly receives millions of taxpayer dollars from California to train its employees, and as a result of IBM's removal of Petitioner Syed Asad ("Asad")'s state claims to federal court, Asad lost procedural due process rights guaranteed him under California law resulting in the premature loss of his lawsuit.

RULE 14.1(b) STATEMENT

A list of all parties to this proceeding in the Court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Syed Asad

Defendant-Appellee and Respondent:
International Business Machines Corporation

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PETITION FOR A WRIT OF CERTIORARI

Syed Asad ("Asad") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U. S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the U. S. Court of Appeals for the Ninth Circuit denying Asad's Petition for Rehearing and for Suggestion for Rehearing en banc filed September 7, 2007, is reproduced at App. A, 1a.

The opinion of the U. S. Court of Appeals for the Ninth Circuit affirming the judgment of dismissal of the District Court in favor of Defendant dated filed June 19, 2007 is reproduced at App. B, 2a-6a.

The Order Granting Summary Judgment, Undisputed Facts and Conclusions of Law of the U. S. District Court for the Central District of California filed August 31, 2005 is reproduced at App. C, 7a-35a.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec.1332(a)(1) and (c)(1) and 28 U.S.C. Sec.1441(b) are the statutes involved. Because of their length they are not reproduced here but rather are found at Appendix D, 36a -41a.

JURISDICTION

The judgment of the U. S. Court of Appeals for the Ninth Circuit was entered on June 19, 2007, and the order denying Asad's Petition for Rehearing and Suggestion for Rehearing *en banc* was entered on September 7, 2007. This petition is timely because it is being filed within ninety days of the entry of the order denying Petition for Rehearing. See Supreme Court Rule 13. 3. This Court has jurisdiction to review the judgment of the U. S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Sec.1254(1).

STATEMENT OF THE CASE

This case arisc from the termination of Asad from his employment with IBM in May 2002. Asad was employed by IBM for nineteen years and was two months short of turning 60 at the time of his termination. He was also earning a good living, making around $129,000.00 a year.

On November 3, 2003, Asad filed his lawsuit in California's Orange County Superior Court pursuant to California Fair Employment and Housing Act ("FEHA") based on age discrimination and retaliation (First Cause of Action ("COA")). Asad also alleged common-law torts for Tortious Conduct in Violation of Public Policy - Age Discrimination, Retaliation, and Wrongful Discharge (Second COA); Breach of Implied Contract (Third COA); and Breach of Implied Covenant of Good Faith and Fair Dealing (Fourth COA). Defendant removed the case to U. S. District

Court on December 5, 2003. Appellant's Excerpts of Record ("AER") I, 1-12; III 747, Docket # ("#") 1.

Jurisdiction of the District Court is based solely on 28 U.S.C. Sec. 1332 (diversity) , since there is no federal question.

What happened to Asad in court turned the legal remedy for his employment termination into a second punishment because his attorney had virtually abandoned him, resulting in the premature termination of his lawsuit.

By the time that Asad realized that his attorney was not doing his job, Asad had passed the point of no return because in being removed to federal court, Asad lost valuable due process rights available to him only under state law that might easily have saved his case for the jury to decide.

A. Asad's Attorney Abandoned the Lawsuit.

IBM and Asad had nine months to complete discovery, from April 2004 to January 2005. IBM took over deposition discovery for a period of five months, from May to October 2004, with the full complicity of Asad's attorney. Excerpts of Record, Volume I, 75:19-21.

As already noted, the lawsuit was filed on November 3, 2003. For a period of 26 months, between November 3, 2003, the filing of the lawsuit, and January 10, 2005, the date the Court approved the attorney subbing out, **the attorney conducted no discovery whatsoever.** He scheduled depositions in

October 2004 and then cancelled them although Asad had directed him to go forward with one of the three depositions and to continue the other two in the next two months. He then scheduled depositions for the penultimate day of the discovery cutoff in violation of the order for Jury Trial issued on April 12, 2004. I, 33, paras. 3,4.

Asad's attorney also **stipulated** that IBM could depose him indefinitely. It is unclear whether the attorney was even aware of Federal Rule of Civil Procedure, Rule 30(d)(2) which limits a deposition to one day of seven hours. Second, Asad's attorney agreed not to notice depositions until Asad's deposition was completed, which took place on June 24 and 25, August 24, and October 13, 2004. I, 100:12-15. He did so, knowing that time was fast running out to take the depositions of IBM Managers. Since discovery cutoff was February 1, 2005, and all depositions had to be noticed five days in advance of the cutoff, IBM and Asad's attorney left Asad only three and a half months to take the depositions of Walt Ling ("Ling"), Terri Pensock ("Pensock") , Susan Levy ("Levy"), James Clark ("Clark"), and Harvey Segal ("Segal"), IBM Managers whom Asad wanted deposed. I, 76; III, 518; 752, #48.

Asad relied on, and trusted, his attorney. He assiduously pursued his rights, as early as May 12, 2004, emailing his attorney about the depositions of IBM managers and was told by his attorney, "'We have plenty of time to obtain discovery including depositions." I, 78. His attorney acknowledged the importance of taking the deposition of Ling on August

3, 2004. Yet, at this point, the attorney had not noticed any deposition.

On September 12, 2004, Asad sent an email to his attorney stating that he wanted the depositions of the key managers taken over a four month period, with two in September, one in October, one in November, and one in December. I, 79:17-25.

On September 20, Asad's attorney notified Asad that IBM would not agree to depositions in California. Because IBM and Asad's attorney agreed that IBM witnesses would not be deposed until Asad's deposition was completed, Asad's depositions were lumped together in October, and with three of them outside California. Pensock's deposition was scheduled in Austin, Texas for October 21, Levy, for October 28, and Ling, for October 28, both in Minneapolis. Asad directed his attorney to go ahead with Ling's deposition scheduled for October 29 and continue the depositions of Levy and Pensock to the next two months. *Id.*

On October 26, Asad learned for the first time that Ling's deposition was cancelled with no explanation and against his explicit direction. Ms. Burkholder's declaration in opposition to Asad's Ex Parte to Extend Discovery Cutoff Date states:

> Asad first noticed depositions in October 2004. [Somewhat disingenuous since Asad had no alternative but to wait until IBM finished its examination of Asad between May and October, given the stipulation of the attorneys]....Then, Asad

unilaterally cancelled these depositions. I, 33, paras. 2-4.

So, neither Asad nor Ms. Burkholder can offer any explanation as to why Asad's attorney cancelled Ling's deposition and why he did not attempt to continue the other two as requested by Asad because of budgetary constraints.

Asad emailed his attorney on November 4, that once more he wanted Ling, Pensock , Levy, Clark, and Segal deposed, requesting the new dates for their depositions, **with no response.** On November 7, Asad sent another email to his attorney asking about the depositions. Because he was also concerned that the depositions would not be completed before the cutoff date of discovery, he also asked his attorney, "'Can the Court extend the discovery deadline in extreme cases??'" **Again, no response.** Having lost complete confidence in his attorney, Asad requested his attorney on November 16 not to do anymore work for him. I, 80;25-28.

The attorney's failure to prosecute Asad's case could have been remedied in state court but not in federal court.

B. In State Court, Asad Would Have Been Afforded Due Process Protection Which would Have Permitted Him to Find Another Attorney to Represent Him.

First, If IBM had been forced to remain in state court, Asad would have had time to find an attorney since the MSJ had to be filed 75 to 80 days before it

was heard and thirty days before trial, meaning it had to be filed and served either 105 days (if hand delivered) or 110 days (if mailed) before trial. However, Asad's opposition would not have been due until **fourteen** days before the hearing, meaning he would have had 61 or 66 days to file an opposition. Discovery would have been continuing, thus creating decent working conditions for a new attorney to enter her appearance. CA Code of Civ. Proced. Sec.437c(a).

Instead, Asad's attorney *stipulated* that the MSJ could be handdelivered (it had to be, given the stipulated time frame (See IBM Supp. ER at 6:19-21)), leaving Asad only **one** week to defend a MSJ which had 79 facts (AER III 714-735) and 218 pages of supporting documents to cull through. See AER I 147-275; II, 287-364. See Appendix C.

Second, in state court Asad could have conducted fact discovery up to thirty days before first date set for trial and up to fifteen days for expert witness depositions. See CA Code of Civ. Proced. Secs. 2024.03, 2024.020, unlike the discovery cutoff in this case which occurred **seven months before trial.** See AER III 749, Entry #16. Further, trial was continued by court on own motion another two months, to November 29, 2005. *Id.*, 752 at entry #53.

Finally, Asad could have sought relief for his attorney's abandonment during discovery pursuant to California Code of Civ. Proced. Sec.473(b) which permits relief from default:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative

from ... order, or **other proceeding** taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Emphasis added.

C. Asad's Attorney Did Not File an Opposition to the District Court's OSC re: Diversity, and Asad Raised the Issue for the First Time in His Petition for Rehearing in the Ninth Circuit.

In his brief on appeal, Asad complained of being removed to federal court on state claims in a footnote. It was not until his Petition for Rehearing that he raised the issue of jurisdiction, arguing that the ubiquitous IBM was a citizen of California, thus defeating diversity. The Court of Appeals ordered IBM to file a response to this issue, but did not permit Asad to file a Reply.

While in ordinary circumstances, where the case was to be tried may not have been of any moment. However, for Asad, removal from state to federal court was the difference between due process and no process *because his attorney had for all practical purposes abandoned Asad's case.*

Thus, whether IBM is a citizen of California has become the pivotal question on which Asad's due process rights turn.

We note that the District Court was concerned enough about whether there was true diversity (believing it to be a subject-matter jurisdiction issue) that she issued an OSC re: diversity, ordering the

defendant to show cause why the matter should not be remanded *with leave to Asad to reply eleven days after IBM's response to the Court order was filed and served.* AER III 747, Entry # 4. And as usual, Plaintiff's counsel did nothing.

As already indicated, the Court of Appeals ordered IBM to respond to Asad's claims in his petition that the federal Court lacked jurisdiction because IBM was a citizen.

D. Based on IBM's Submissions to Ninth Circuit and Independent Research by Asad, IBM Is a Citizen of California Based on "Principal Place of Operations" Standard.

In response to the Ninth Circuit's order, IBM provided a copy of its response to the District Court's OSC re: diversity. In the response, it merely stated that IBM is a

> ...business entity organized and existing under the laws of the State of New York, and having its principal place of business, both at the present time and at the time the Superior Court action was filed, in Armonk, New York. By reason of the foregoing, IBM is a citizen of the State of New York under 28 U.S.C. Sec.1332(c)(1). Exh. A, p.2, parag. 5 attached to Declaration of Randa A. F. Osman in Support of Appellee IBM Corporation's Response to Petition for Rehearing and Suggestion for Rehearing en Banc.

In IBM's Answer (Exh. C, *Id.*), IBM merely denied all allegations in the complaint, including the allegation that IBM was a "...corporation duly authorized to conduct business in, and conducting business in, the County of Orange, State of California." (Exh. A, p.2, parg. 2, *id.*)

In the Declaration of Gary Wenthold, IBM Director of Global Human Resources Information & Analysis, in response to the Ninth Circuit's order, Mr. Wenthold indicated that California had the fourth highest number of employees (assumedly in the world), 10,750 with New York in first place with 27,726 employees, North Carolina in second place with 15,285 employees, and Texas in third place with 13,025 employees. He also stated that as of the date he executed his declaration, August 20, 2007, New York was still in first place, but with a loss of 5,000 employees to 22,815, North Carolina down 550 or so employees, to 12,557, and Texas down 700 or so employees, to 12,391. California, per his records, was down by about 300 employees, to 10,496. Exhs A, B, attached to Wenthold Declar., *Id.*

In Declaration of Marji Gordon-Brown, IBM Manager of State Tax Operations, Ms. Gordon-Brown acknowledged that California is, by far, the biggest income producer for IBM by **over a billion dollars.** In 2003, per Gordon-Brown, California earned **$3.5 billion in revenue** with **New York earning $2.3 billion, Illinois, $2.7 billion, New Jersey, $2.5 billion, and Texas, $2.2 billion.**

In 2006 California increased IBM's earnings, to $3.6 billion, with New York losing earnings to

$2.1 billion, Texas, holding at $2.2 billion, and New Jersey, losing, to $2.0 billion. Gordon-Brown Declaration, pp.1-2, parag.3, *Id. In other words, California outperforms its closest competitor, New York, by **1.5 billion dollars!***

Of concern is Mr. Wenthold's declaration at p.2, parag. 3 where he discussed IBM's production activity. He states:

> California, with 214 employees performing primarily production work at a manufacturing facility in San Jose, was ranked a distant fourth.

Mr. Wenthold did not mention that San Jose has the world's Largest Software Development Laboratory in Santa Teresa (San Jose environs) which generates more than $2 Billion in revenue for IBM and has more than 1000 employees in a campus-like setting. He also made no mention of the world's largest Research Facility in Almaden, in the city of San Jose known as Almaden Research Center which houses more than 400 IBM Scientists. Also, IBM acquired INFORMIX and CANDLE corporation in California which have hundreds of employees in Silicon Valley and El Segundo, California.

By far, the most far reaching impact IBM has on the residents of California is that it receives generous tax subsidies to train its employees through the state employment training panel. California approved **$1,285,200.00 in state funding** on October 27, 2006. Memorandum ("Memo"), State of CA, Employment Training Panel ("ETP"), from Creighton Chan, Manager, to Panel Members (ETP members), subject:

One-Step Agreement for International Business Machines Corporation. Appellant's Request to Take Judicial Notice.

In fact, Mr. Chan's analyst D. Woodside who wrote the memorandum assumedly stated at p.2 that IBM

> ...is eligible for ETP funding under Title 22, California Code of Regulations, Section 4416(b) because it **faces out-of-state competition.**

The memorandum goes on to state:

> Even with its global reach, **IBM maintains a strong presence in California. This is particularly strong in the San Francisco Bay area and Silicon Valley. In fact, IBM reports that it looks to its two Northern California research and development locations, the Silicon Valley Laboratory and the Almaden Research Center, both in San Jose, to conduct basic and applied research in computer science, magnetic and optical storage technology, physical and materials science and technology, and scientific and technical application software. IBM believes that its California employees are critical to the company's evolution from hardware design and production to business and technical solutions, software development, and implementation.**
>
> **Currently, the State of California *ranks number four in the total number of IBM employees in the United States and the***

> ***company reports that from July 2004 to July 2006, the company hired 2,469 new employees in California (total of 9,689). During the same time period, the State of California ranked number <u>two</u> in growth of IBM employees (just behind the IBM headquarters in New York). ...***
>
> **By providing the computer and continuous improvement skills outlined in this proposal, IBM will be better able to maintain its growth in California and provide its California workers with skills to innovate and develop new products. This will generate demand for additional positions to manage, market, and employ these new innovations. *IBM's goal is to ensure these new positions remain in California.*** Emphasis added, p.2, Memo.

IBM's proposed training, the memo states, meets ETP goals and objectives, including "...support[ing] this company's expansion efforts in California and the retention of long-term high wage jobs with career potential." *Id.*

The Memo also notes that

> IBM has a network of field locations in California. ... A total of 1,400 workers located in San Jose, Burlingame, Cupertino, San Francisco, Sacramento, Costa Mesa, San Diego, Irvine, Glendale, Los Angeles, and San Ramon will be retained. *Id.* At p.5.

The above cities do not include the city where Asad worked in Orange County.

Also, in 2004 IBM received **$1,108,640.00 from California to train its employees.** Report of State of California Employment Training Panel Meeting, held in Sacramento, CA, on August 27, 2004, p.15.

There is no question that IBM plays a huge role in California, and IBM's California holdings, research, and employees contribute significantly to the wealth of IBM. One cannot ignore the enormous influence IBM continues to wield in the "Silicon Valley" (San Jose area). IBM is an iconic corporation, not just an employer. For example, one of IBM's buildings in the San Jose area was described by a California Court of Appeals as a "....significant historic resource":

> Intervener International Business Machines, Inc. (IBM), owns an 18.75-acre site on which stands Building 025, other structures, parking lots and landscaping. Building 025 is a 69,000-square-foot building consisting of five wings connected by a narrow spine. It was built in the mid-1950's, and IBM continued to use Building 025 until the late 1990's. Since then, Building 025 has been unused. Building 025 itself is in good condition, although the exterior veneers are in critical need of maintenance.[fn1 omitted] Building 025 is a significant historic resource because it is "one of the finest examples of Modern industrial architecture in Santa Clara County," and it was the site of the invention of the "flying head" disk drive. *Preservation Action v. Jose* (2006) 141 Cal.App.4th 1336, 1341-1342.

Not only was this so-called "non citizen" corporation allowed to intervene but the Court agreed with IBM and the Preservation Action Council that the City of San Jose's decision to demolish Building 025 was improper and affirmed the trial court's issuance of a writ of mandate requiring the City of San Jose to rescind its decision certifying the EIR and approving the project.

IBM leaves it mark in other ways on California. It established an unwitting, but excellent, precedent for workers in a California workers compensation case, *IBM Corp. v. Workers' Comp. Appeals Bd.* (1978) 77 Cal.App.3d 279 in which the Court upheld workers' compensation payments to the survivors of an IBM employee who worked in California but was killed returning to Chicago where he was sent for training by IBM from a personal visit in Wisconsin.

Using the ruse of diversity to remove state claims to federal court may have been the result of the California Court of Appeals ruling in *Rulon-Miller v. International Bus. Machines Corp.* (1984) 162 Cal.App.3d 241, 244 which affirmed the San Francisco jury verdict against IBM. IBM had appealed from the judgment entered against it after a jury awarded $100,000 compensatory and $200,000 punitive damages to respondent (Virginia Rulon-Miller) on claims of wrongful discharge and intentional infliction of emotional distress. Rulon-Miller was a low-level marketing manager at IBM in its office products division in San Francisco. Her termination as a marketing manager at IBM came about as a result of an accusation made by her immediate supervisor, defendant Callahan, of a romantic relationship with

the manager of a rival office products firm, QYX. IBM fired her for having the romantic relationship, and Rulon-Miller prevailed.

The *Rulon-Miller* ruling has had far-reaching and beneficial consequences for California employees who rely on it as a precedent in their own cases.

IBM's removal of Asad's case was clearly a calculated decision designed to lessen the risk of another *Rulon-Miller* jury verdict.

Thus, IBM wants all the benefits of California citizenship, especially generous gross earnings beating out the next highest gross earner by **$1.5 billion dollars** and tax subsidies from its fellow citizens, but none of the duties and obligations, such as, submission to the jurisdiction of a state court over state claims.

So, it ended up that Goliath removed hapless David to federal court, effectively removing even David's slingshot by successfully arguing to the Court that because Asad's attorney **did nothing**, Asad should **not** be allowed to **do something**.

It is impossible to determine what the outcome would have been had Asad had competent attorney representation.

E. It Is Likely that with the Statutory Protections Asad Had in State Court, Asad would Have Survived Summary Judgment.

The reviewing panel was completely silent about the scandalous state of affairs Asad's attorney left him

in, discussing the denial of Asad's request to extend the cutoff date for discovery in a vacuum, simply stating

> ...it is not reasonably probably that Asad could have shown that IBM's legitimate non-discriminatory and non-retaliatory reasons for not promoting and for terminating him were pretextual. Thus, because he cannot show prejudice, Asad's claim fails. Decision, pp. 4-5.

Judge Gould asked Ms. Barry at oral argument whether it was "murky" when Asad refused to meet with his supervisors while on vacation and they were demanding answers re: the reorganization (although Asad was communicating with them via emails). The answer is "Yes".

First, with discovery, Asad could have proven how many reorgs there had been in the last three or four years to demonstrate that they are common occurrences and therefore arguably, there will never be a "good time" for a manager like Asad to take a vacation because layoffs are so common. Second, why was IBM letting the relationship between Levy and Asad fester where she was making judgment determinations about Asad's performance and conduct when she knew he was complaining that she was less qualified than he to hold the job which gave her the power to judge him, and that she got it, not on qualifications but because she was younger than he?

Third, we could have discovered the custom and practice of planning and taking vacations, a critical point since Asad had NEVER been disciplined in his 19

years of employment for anything, least of all, for taking a vacation, raising an inference that all the huffing and puffing Asad's supervisors were making about his responses while he was on vacation was pretext to get rid of him because he was opposing Levy's and other managers' discrimination and retaliation.

As the Ninth Circuit noted in *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir 1988):

> Because Schwartzman has established that there exists a jury question on the issue whether his protected activities were a substantial factor in the discharge, summary judgment may not be granted to the appellants on the basis of their claim that Schwartzman's termination would have been justified on other grounds. "The evidence put forward by the defendants is definitive only in establishing that [plaintiff] *could* have been transferred . . . because of his non-protected activity . .. and not that he *would* have been transferred. . . . That [plaintiff's] insubordinate conduct might have justified an adverse employment decision . . . does not suffice." *Id.* at 435.

The denial of discovery to Asad was dramatically brought home when IBM's counsel argued orally that Asad's evidence on the Higgins selection should not be considered because it was hearsay or not authenticated – something along those lines. In the face of IBM removing Asad to federal court on state claims when IBM does huge business and employs over 10,000 employees in California, and has its hand out annually for — and received – California taxpayer-subsidized

employee training, in the face of Asad's attorney not fighting diversity jurisdiction, stipulating that he would give himself only one week to defend IBM's inevitable magnus opus of a MSJ, and conducting NO discovery, in the face of IBM attorney's opposition to Asad extending discovery cutoff date to obtain discovery because none was taken by his attorney, and in the face of IBM failing to provide any evidence on the Higgins promotion, arguing to the panel that Asad's evidence on the Higgins promotion was not admissible -- that's like tying up a person's hands and then telling her she loses because she could not open a door.

Nowhere in the five page decision (Appendix B) did the Court discuss or consider the arguments of Asad at OB 25-32 concerning reversal based on extreme attorney neglect. Discovery was critical, especially with respect to the Higgins promotion and to the termination itself. Emails among the various supervisors concerning Asad would have been extremely enlightening and most likely would have provided direct evidence of their animus against Asad. We already established by the timing of the termination that retaliation was the real reason for the termination. See OB 39-52; Reply Brief at 12-15. This was the heart and soul of Asad's appeal, with the presentation of evidence of retaliation and discrimination to demonstrate that the case is worth reversing so that Asad can conduct discovery.

As this writer informed the panel at oral argument, she practices regularly in the federal courts and has appeared many times in the Ninth Circuit, which she enjoys and feels honored and privileged to do so.

However, state claims should stay in state court, particularly because of the MSJ problems facing plaintiffs and their attorneys in federal court.

REASONS FOR GRANTING THE PETITION

This Court should accept Asad's petition.

As the Ninth Circuit pointed out in *Tosco Corp. v. Communities for Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001), the Ninth Circuit

> ...determines that a corporation's principal place of business is in the state which "contains a substantial predominance of corporate operations." *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (quoting *Co-Efficient Energy Systems v. CSL Industries*, 812 F.2d 556, 558 (9th Cir. 1987)). Second, the "nerve center test" locates a corporation's principal place of business in the state where the majority of its executive and administrative functions are performed. See id. at 1092-93 (citing Inland Rubber Corp. v. Triple A Tire Service, Inc., 220 F.Supp. 490, 496 (S.D.N.Y. 1963)). The Ninth Circuit Court of Appeals has given lower courts direction to determine which of these tests to apply: where a majority of a corporation's business activity takes place in one state, that state is the corporation's principal place of business, even if the corporate headquarters are located in a different state. The "nerve center" test should be used only when no state contains a substantial predominance of the corporation's business activities. *Industrial Tectonics, Inc. v. Aero*

> *Alloy*, 912 F.2d at 1094 (emphasis added). Thus, the Ninth Circuit applies the place of operations test unless the plaintiff shows that its activities do not substantially predominate in any one state.

While IBM claims that the "nerve center" test applies, it is clear from the empirical evidence adduced that California is IBM's principal place of operations. California is **the** leading income producer – by 1.5 billion dollars – of any other state, including its "nerve center", New York. While it may be only number four in terms of number of employees, it is clear with all the laboratories it has operating in San Jose area (Silicon Valley) that its research and its chief scientists are located in Northern California.

> ... "substantial predominance" does not require the majority of a corporation's total business activity to be located in one state, but instead, requires only that the amount of corporation's business activity in one state be significantly larger than any other state in which the corporation conducts business. *Id.*, at 502.

It is clear that IBM's principal place of operations is California.

IBM had the burden of establishing diversity of citizenship and yet, all it alleged in its response to the District Court's OSC re: diversity was that IBM is incorporated in New York with its principal place of business there and since Asad was a citizen or resident of California, these allegations therefore satisfy the requirements of 28 U.S.C. Sec.1332(a).

For example, in *Commissioner v. Soliman*, 506 U.S. 168 (1993), this Court rejected a Court of Appeals test of what constitutes "principal place of business" in a tax case because it failed to undertake a comparative analysis of the taxpayer's various business locations. The Court stated that it looks to words' "ordinary, everyday senses" in interpreting a revenue statute's meaning. E.g., Malat v. Riddell, 383 U.S. 569, 571. Section 280A(c)(1)(A) refers to the "principal place of business," and both the commonsense and dictionary meanings of "principal" demonstrate that this constitutes the most important or significant place for the business, as determined through a comparison of all of the places where business is transacted.

In Justice Stevens' dissenting opinion, [fn14] at p. 191 he noted that

> For example, in *Texas v. New Jersey*, 379 U.S. 674, 680 (1965), we used the terms "main office" and "principal place of business" interchangeably. I recognize that there is disagreement over the proper interpretation of the term in 28 U.S.C. § 1332(c)(1), with some courts regarding the home office as the principal place of business and others regarding it as the place where the principal operations of the corporation are conducted. ...

While over a hundred years ago, the company which became IBM came into existence in 1888 as the Tabulating Machine Company in New York and probably remains in New York out of sentimental value and tradition, nonetheless, it is uncontroverted that in the 21st century, California is IBM's leading profit and research center.

This Court should grant this petition because the definition of "principal place of business" in 28 U. S. C. Section 1332 should be defined by this Court. There are too many instances in which national corporations who have their principal places of operation in one state or another take advantage of the diversity statute to avoid more liberal protections for the state resident found in state court for **state claims** as occurred here.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-56405

[Filed September 7, 2007]

SYED ASAD,
Plaintiff - Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, a/k/a/ IBM,
Defendant - Appellee.

D.C. No. CV-03-01743-AHS
Central District of California, Santa Ana

ORDER

Before: THOMAS and GOULD, Circuit Judges, and CHESNEY,* District Judge.

* The Honorable Maxine M. Chesney, United States District Judge for the Northern District of California, sitting by designation.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-56405
D.C. No. CV-03-01743-AHS

[Filed June 19, 2007]

SYED ASAD, Plaintiff - Appellant, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a/k/a/ IBM, Defendant - Appellee.	)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: THOMAS and GOULD, Circuit Judges, and CHESNEY,** District Judge.

Syed Asad ("Asad") appeals (1) the district court's grant of summary judgment for IBM, (2) the district court's denial of his motion for extension of the discovery cutoff date, and (3) the district court's denial of his motion to file a surreply brief in opposition to IBM's motion for summary judgment.[1]

Asad argues that the district court erred by granting summary judgment in favor of IBM because he raised genuine issues of material fact in three areas: (1) age discrimination based on non-promotion; (2) retaliation based on a hostile work environment; and (3) retaliation based on termination.[2] To establish a prima facie case of age discrimination, Asad must provide "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (internal quotation marks and alterations omitted) (italics omitted). Once established, the burden shifted to IBM "to prove it had a legitimate non-discriminatory reason

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** The Honorable Maxine M. Chesney, United States District Judge for the Northern District of California, sitting by designation.

[1] Because the parties are familiar with the factual and procedural history of this case, we do not recount it in detail here.

[2] We review a district court's decision to grant summary judgment de novo. *See Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

for" not promoting him. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1144 (9th Cir. 2006). If IBM met that burden, then Asad "must prove that such a reason was merely a pretext for intentional discrimination."[3] *Id.*

Even assuming that Asad was qualified to be promoted and that he established a prima facie case of age discrimination, IBM provided legitimate non-discriminatory reasons why other candidates were promoted instead of him. IBM stated that Levy received the promotion over Asad because "she had [more extensive] experience as a second line manager, had international and field experience, . . . and had experience across several product lines and solution areas." And IBM explained that Asad was not promoted to a position in the Middle East because of a lack of funding. Asad did not demonstrate that these reasons were pretextual. Thus, his age discrimination claim fails.

To establish a prima facie case of retaliation, Asad needed to show that "1) he engaged in a protected activity; 2) he suffered an adverse employment decision; and 3) there was a causal link between [his] protected activity and the adverse employment

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[3] Although this test originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), which involved a Title VII claim of race discrimination, the test also applies in the context of age discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000).

decision."[4] *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). Because Asad raises the argument that IBM retaliated against him by creating a hostile work environment for the first time on appeal, we treat that issue as waived. *See Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

IBM maintains that it terminated Asad for insubordination. We conclude that there was sufficient evidence to support IBM's position that the termination was for insubordination, and because Asad did not rebut this evidence, his retaliation claim fails.

Next, Asad maintains that the district court erred by denying his motion to extend the discovery cutoff date. "[A] decision to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (internal quotation marks omitted). Prejudice is established if there is a "reasonable probability that the outcome would have been different" had discovery been allowed. *Martel v. County of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (en banc). Here, even with additional discovery, it is not reasonably probable that Asad could have shown that IBM's legitimate non-discriminatory and non-retaliatory reasons for not

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[4] This test is identical to a retaliation claim under the California Fair Employment and Housing Act. *See Flait v. North American Watch Corp.*,4 Cal. Rptr. 2d 522, 528 (Cal. Ct. App. 1992).

promoting and for terminating him were pretextual. Thus, because he cannot show prejudice, Asad's claim fails.

Finally, Asad moved the district court to allow him to file a surreply brief alleging it was IBM policy to communicate layoff information to first line managers. We review a trial court's decisions regarding management of litigation for an abuse of discretion. *See FTC v. Enforma Natural Products*, 362 F.3d 1204, 1212 (9th Cir. 2004). IBM concedes that it is IBM policy to communicate information about layoffs to first line managers. Thus, the district court did not abuse its discretion by denying Asad's motion.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT
OF CALIFORNIA
SOUTHERN DIVISION

CASE NO. SA CV 03-1743 AHS (ANx)

[Filed August 31, 2005]

SYED ASAD, an individual, Plaintiff,	)
v.	)
INTERNATIONAL BUSINESS MACHINE, also known as IBM, a corporation; and, DOES 100, inclusive, Defendants.	)

~~DEFENDANT INTERNATIONAL BUSINESS MACHINES CORPORATION'S SEPARATE~~ STATEMENT OF UNDISPUTED FACTS AND CONTENTIONS OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

BEST AVAILABLE COPY

~~Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56-1, Defendant International Business Machines Corporation ("IBM") submits~~ The Court adopts the following Statement of Uncontroverted Facts and Conclusions of Law in support of IBM's Motion for Summary Judgment~~, or in the alternative, partial summary judgment~~, as modified.

Issue No. 1: IBM is entitled to summary adjudication of plaintiff's first cause of action for age discrimination, retaliation and wrongful discharge in violation of *Cal. Gov't Code* § 12940 and 12941 et seq., because the challenged employment actions were not adverse employment actions and/or were taken for legitimate, non-discriminatory reasons and plaintiff cannot prove pretext.

Asad's Employment with IBM

UNDISPUTED FACTS	EVIDENTIARY SUPPORT
1. On September 1, 1982, Asad began working at IBM as an Account Systems Engineer.	Deposition Transcript of Syed Asad, Vol. I, dated June 24, 2004 ("Asad Tr. Vol. I"), at 33:12-17; a true and correct copy of excerpts of the Asad Tr. I are attached as Exhibit A to the Declaration of Allison L. Burkholder dated June 6, 2005.

2. Asad was 41 years old when he was hired by IBM.	Asad Tr. I, 234:7-8.
3. In April 1999, after being promoted several times, Asad interviewed with Terri Pensock, Maryanne Messina and Art Harbison and was promoted by Ms. Pensock to Technical Support Marketing Manager for the IBM e-server P-Series Group.	Asad Tr. I, 37:8-38:1; 41:4-13.
4. Asad was 56 years old in April 1999, when he was promoted to the Technical Support Marketing manager position.	Asad Tr. I, 234:7-8.

Asad Alleges Ms. Pensock Inquired into the Length of Time Asad Intended to Work at IBM

5. Asad alleges that Ms. Pensock discriminated against him because she in November 2000, Ms. Pensock asked him whether he planned to work for IBM for an additional 15 to 20 years.	Asad Tr. I, 178:18-25; 180: 1-6.
6. Asad testified at deposition that he did not have any information or evidence that lead him to believe that this comment was motivated by his age.	Deposition Transcript of Syed Asad, Vol. III, dated August 24, 2004 ("Asad Tr. Vol. III"), at 695:1-25; a true and correct copy of excerpts of the Asad Tr. III are attached as Exhibit C to the Burkholder Decl.
7. Ms. Pensock inquired as to how long Asad intended to work for IBM because she did not want to waste time and money developing Mr. Asad's career if he intended to leave after a short period of time.	Declaration of Terri Pensock, dated June 3, 2005 ("Pensock Decl.") ¶ 4.

8. In February 2001, Ms. Pensock placed Asad in the Executive Resources Database.	Asad Tr. I, 161:9-18; Pensock Decl. ¶ 6.
9. In July 2001, Ms. Pensock assigned Asad to be the second line manager for the Sales Education and Technical Support Marketing Departments.	Asad Tr. I, 200:14-201:17; Pensock Decl. ¶ 10.

Asad Has No Evidence That Age Had Anything To Do With His Failure To Obtain Executive Positions

10. Asad alleges IBM refused to promote Asad because of age discrimination.	Complaint ¶ 29.

11. Asad alleges that in October 2001, he told Walter Ling, Vice President, Sales & Technical Support, Server Group, that he wanted the Director position that Susan Levy eventually received.	Deposition Transcript of Syed Asad, Vol. II, dated June 25, 2004 ("Asad Tr. Vol. II"), at 345:2-22; a true and correct copy of excerpts of the Asad Tr. II are attached as Exhibit B to the Burkholder Decl.; Declaration of Walter Ling, dated June 6, 2005 ("Ling Decl.") ¶ 1.
12. Asad admitted in deposition that has no evidence that he did not receive this Director position because of his age.	Asad Tr. II, 358:8-21.
13. Asad alleges that he was discriminated against because of his age because Mr. Ling did not make efforts to find him an executive position.	Asad Tr. II, 419:24-420:4.

14. Asad admitted in deposition that he has no evidence that Mr. Ling did not recommend him for the General Manager of Europe, Middle East and Africa position, or that he purportedly did not recommend him for the position because of his age.	Asad Tr. II, 424:11-425:8
15. Asad alleges that Ms. Levy discriminated and retaliated against him by attempting to move him laterally rather than promoting him.	Asad Tr. I, 255:20-256:4, 258:20-23. Asad Tr. III, 809:16-24.
16. Asad testified in deposition he has no evidence that Ms. Levy attempted to move him laterally rather than promote him because of his age or as retaliation.	Asad Tr. I, 257:5-258:8, 259:4-17; Asad Tr. III, 811:3-812:6

17. Asad alleges that Mr. Ling discriminated against him based on his age because he asked him to speak with Ms. Pensock when Asad inquired of Mr. Ling about an open director position.	Asad Tr. II, 339:20-340:2.
18. Asad admitted in deposition that he has no evidence that Mr. Ling asked him to speak with Ms. Pensock when Asad inquired about an open director position because of his age.	Asad Tr. II, 358:8-21.
19. Asad alleges that Mr. Ling retaliated against him by trying to oust Asad from his department by offering lateral transfers.	Asad Tr. I, 145:12-19; Deposition Transcript of Syed Asad, Vol. IV, dated October 13, 2004 ("Asad Tr. Vol. IV"), at 915:5-15; a true and correct copy of excerpts of the Asad Tr. IV are attached as Exhibit D to the Burkholder Decl.

20. Asad testified in his deposition that he does not have any evidence to support his allegation that Mr. Ling discriminated against him based on his age and retaliated against him by trying to oust Asad from his department.	Asad Tr. II, 443:10-25; Asad Tr. IV, 915:18-916:7.
21. Asad admits that he did not suffer any adverse employment action as a result of Mr. Ling allegedly sending Ms. Levy memos concerning lateral job vacancies for Asad.	Asad Tr. II, 442:11-19.
22. Asad alleges that Mr. Ling discriminated against him because he appointed him a team leader when Asad proposed a re-organization that would create a director position for Mr. Asad.	Asad Tr. II, 490:6-490:15.

23. Asad admitted in deposition that he has no evidence that Mr. Ling did not reorganize the department in such a way that would promote Asad to a director position because of his age.	Asad Tr. II, 501:3-9.
24. Asad alleges that Ms. Pensock retaliated against him for initiating an open door against her in October 2002 by not "giving a warm handshake to Mr. Ling". (Asad defines a "warm handshake" as Ms. Pensock telling Mr. Ling about Asad's career aspirations)	Asad Tr. II, 554:19-555:18; 558:6-13.
25. Asad testified in deposition that he has no evidence that Ms. Pensock retaliated against Asad by not giving a "warm handshake" to Mr. Ling.	Asad Tr. II, 557:4-558:3; 558:14-559:5.

Asad's Remaining Allegations Involve Disagreement With His Managers Or Unfulfilled Threats By Management

Asad's Allegation Against Mr. Ling

26. Asad alleges that Mr. Ling discriminated against him because he improperly delegated Mr. Ling's duties to Mr. Clark, his human resources partner.	Asad Tr. I, 121:5-16.
27. Asad testified in deposition that he did not suffer any adverse employment action because of any delegation of Mr. Ling's improperly delegated duties to Mr. Clark.	Asad Tr. II, 479:1-6.
28. Asad alleges that Mr. Ling retaliated against him by "marking him for termination."	Asad Tr. IV, 1097:8-13.

29. Asad admitted in deposition that he has no evidence that Mr. Ling retaliated against him by marking him for termination.	Asad Tr. IV, 1101:15-1102:3.
30. Asad alleges that Mr. Ling retaliated against him by not having a one-on-one meeting with Asad to avoid litigation.	Asad Tr. IV, 1103:5-11.
31. Asad admitted in deposition that he has no evidence that Mr. Ling retaliated against him by not having a one-on-one meeting with Asad to avoid litigation.	Asad Tr. IV, 1111:25-1112:15.

Asad's Allegations Against Ms. Pensock

32. Asad alleges that Ms. Pensock discriminated against him based on his age because she asked him to provide his pre-IBM employment history on his Executive Resources Database form.	Asad Tr. I, 216:25-217:11.

33. Asad testified in deposition that he has no evidence that Ms. Pensock asked him to provide his pre-IBM employment history on his Executive Resources Database form because of his age.	Asad Tr. I, 222:24-223:4; 223:18-224:6.

Asad's Allegations Against Ms. Levy

34. Asad alleges Ms. Levy discriminated against him because of his age because she questioned him about why he did not observe the travel procedure to send Mr. Bocek, one of Asad's subordinates, to e-Server University.	Asad Tr. I, 265:23-266:1.
35. Asad admitted in deposition that he has no evidence that Ms. Levy discriminated against him because of his age when she questioned him about why he did not observe the travel procedure to send Mr. Bocek, one of Asad's subordinates, to e-Server University.	Asad Tr. I, 266:2-24.

36. Asad also testified in deposition that he did not suffer any adverse employment action as a result of Ms. Levy questioning him about why he did not observe the travel procedure to send Mr. Bocek, one of Asad's subordinates, to e-Server University.	Asad Tr. I, 264:5-265:22.
37. Asad alleges that Ms. Levy discriminated against Asad based on age and retaliated against him by criticizing him for the amount of time it took him to complete an assignment regarding Bob Rittle.	Asad Tr. I, 272:5-7; 141:14-20; Asad Tr. III, 818:11-820:4.
38. Asad admitted in deposition that he does not have any evidence that Ms. Levy discriminated against him based on age or retaliated against him when she criticized him for the amount of time it took him to complete an assignment regarding Mr. Rittle.	Asad Tr. I, 271:25-272:18.

39. Asad admitted in deposition that he did not suffer any adverse employment action because Ms. Levy criticized the amount of time it took him to complete an assignment regarding Mr. Rittle.	Asad Tr. I, 271:18-271:24.
40. Asad alleges Ms. Levy discriminated against him and retaliated against him based on age when she became angry with Asad over his replies to e-mails.	Asad Tr. I, 274:11-15; Asad Tr. III, 836:9-16.
41. Asad admitted in deposition that he has no evidence that Ms. Levy discriminated against him based on age or retaliated against him when she became angry with Asad over replies to e-mails.	Asad Tr. I, 277:3-18.
42. Asad admitted in deposition that he did not suffer any adverse employment action when Ms. Levy became angry with him over replies to e-mails.	Asad Tr. I, 276: 15-277:1.

43. Asad alleges that Ms. Levy discriminated against him based on age and retaliated against him when she humiliated him by asking him why he did not do his homework during a presentation to Gary Lancaster, a vice president, and by sending instant messages to Mr. Lancaster saying negative things about Asad.	Asad Tr. I, 278:4-8, 284:11-14. 286:8-287:22; Asad Tr. III, 840:3-22.
44. Asad testified in deposition that he has no evidence that Ms. Levy discriminated against him because of his age and retaliated against him when she asked him why he did not do his homework in a presentation before Gary Lancaster, and when she purportedly sent instant messages to Mr. Lancaster concerning Asad.	Asad Tr. I, 284:14-25; 288:20-25.

45. Asad alleges that Ms. Levy discriminated against him based on age and retaliated against Asad because she threatened to make it a condition of his employment to fly to Atlanta to meet her on one day's notice.	Asad Tr. I, 290:19-23; Asad Tr. III, 841:11-22.
46. Asad testified in deposition that he has no evidence that Ms. Levy discriminated against him based on age by threatening to make it a condition of his employment to fly to Atlanta to meet her on one day's notice.	Asad Tr. I, 298:5-17.
47. Asad admitted in deposition that he did not suffer any adverse employment action as a result of Ms. Levy purportedly threatening to make it a condition of Asad's employment to fly to Atlanta to meet her on one day's notice.	Asad Tr. I, 297:18-25.

48. Asad testified in deposition that Ms. Levy did not make it a condition of employment for him to fly to Atlanta to meet her.	Asad Tr. I, 297:12-17.
49. Asad alleges Ms. Levy discriminated against him based on age because she wanted him to be available on IBM's instant messaging system.	Asad Tr. I, 106:7-23.
50. Asad testified in deposition that he did not suffer any adverse employment action because Ms. Levy wanted him to be available on IBM's instant messaging system.	Asad Tr. I, 309:1-16.
51. Asad alleges that Ms. Levy discriminated against him based on age because she corrected his grammar and spelling on a presentation.	Asad Tr. 106:24-107:14.

52. Asad testified in deposition that he has no evidence that Ms. Levy corrected his grammar and spelling on a presentation because of his age.	Asad Tr. I, 316:14-16.
53. Asad Alleges that Ms. Levy discriminated against him based on his age by not allowing Asad to hire.	Asad Tr. I, 114:8-19.
54. Asad admitted in deposition that he has no evidence that Ms. Levy did not allow him to hire a first line manager because of Asad's age.	Asad Tr. II, 321:7-23.
55. Asad admitted in deposition that he did not suffer any adverse employment action because Ms. Levy did not allow him to hire a first line manager.	Asad Tr. II., 321:24-322:14.

Asad's Allegations Against Mr. Clark

56. Asad alleges Mr. Clark retaliated against him because he was an older worker by not sending Asad forms to update the Executive Resources Database.	Asad Tr. II, 561:12-562:1; 563:7-11.
57. Asad testified in deposition that he did in fact receive the Executive Resource Database forms, and did not suffer any adverse employment action as a result of Mr. Clark not sending him the forms.	Asad Tr. II, 562:17-563:6, 567:13-568:8.
58. Asad alleges that either Mr. Ling or Mr. Clark retailed against him for initiating the open door by instructing Mr. Seales or Mr. Callahan to speed up the open door investigation.	Asad Tr. I, 145:20-146:1; Asad Tr. II, 576:4-8, Asad Tr. IV, 921:13-18.

59. Asad admitted in deposition that he has no evidence that either Mr. Clark or Mr. Ling retaliated against him for initiating the open door by purportedly because they instructing Mr. Seales or Mr. Callahan to speed up the open door investigation.	Asad Tr. II, 576:9-577:8; Asad Tr. IV, 921:13-922:5.

IBM Directs Asad To Select Employees for Layoff

60. In about April and May 2002, IBM initiated a company-wide resource action, in which 8% of its workforce was to be laid off.	Asad Tr. II, 528:5-21; Declaration of Susan Levy, dated June 4, 2005 ("Levy Decl.") ¶ 13; Declaration of Walter Ling, dated June 6, 2005 ("Ling Decl.") ¶ 10.
61. In April 2002, Ms. Levy directed Asad to recommend two to three employees from his group to be laid off in the resource action.	Asad Tr. IV, 1090:14-18. Levy Decl., ¶ 13.

62. Asad refused to follow Ms. Levy's directions to select two or three employees for layoff.	Asad Tr. IV, 1090:14-18; Levy Decl., ¶ 14; *see* e-mail dated May 3, 2002; a true and correct copy is attached hereto as Exh. H to the Levy Decl.
63. Ms. Levy instructed Asad not to discuss the layoff with his first line managers, Harvey Segal and Roland Begin.	Levy Decl. ¶ 13.
64. Contrary to Ms. Levy's instructions, Asad did discuss the layoff with his first line manager, Harvey Segal, and told him not to select any employees for layoff.	Asad Tr. IV 1019:19-1021:20, 1091:1-7; Levy Decl. ¶ 19.

Asad Refuses To Communicate With Ms. Levy

65. On April 26, 2002, Levy attempted to reach Asad at least twice to discuss Asad's failure to select employees for layoff.	Asad Tr. IV, 1049:4-12. Levy Decl. ¶ 14; *see* e-mail dated April 26, 2002; a true and correct copy is attached as Exh. E to the Levy Decl.; *see* e-mail dated April 26, 2002; a true and correct copy is attached hereto as pages 2 and 3 to Exh. F to the Levy Decl.
66. Asad did not return Ms. Levy's efforts to reach him on April 26 or the next day.	Asad Tr. IV, 1051:24-1052:2.
67. On April 28, 2002, Asad e-mailed Ms. Levy and stated he would be out of the office that week "to get some personal work done," and that he had sent his final layoff selection materials to Ms. Levy.	*See* e-mail dated April 28, 2002, a true and correct copy is attached hereto as page 2 to Exh. F to the Levy Decl.

Asad Ignores Ms. Levy's Instructions To Select Employees For Layoff

68. On his resource selection worksheets, Asad did not list any employees for layoff; instead, he listed all of his employees as "no surplus" and assigned all employees an equal skill rating of "high".	Asad Tr. IV, 1135:1-8; *see* resources selection worksheets, dated April 28, 2002; true and correct copies are attached hereto as Exh. G to the Levy Decl.
69. On April 29, Ms. Levy again requested that Asad contact her because the resource selections were not made correctly.	Levy Decl. ¶ 18; *see also* e-mail dated, April 29, 2002, a true and correct copy is attached hereto as pages 1 and 2 to Exh. F to the Levy Decl.
70. Asad replied to Ms. Levy by e-mail on April 29, 2002, stating that "I am out this week and I have lots of legal paperwork to do this week."	*See* e-mail dated April 29, 2002, a true and correct copy is attached hereto as page 1 to Exh. F to the Levy Decl.; Asad Tr. IV, 1139:18-1140:5.

Asad's Termination

71. On April 29, Mr. Ling sent an e-mail and left a voice message for Asad to call Ms. Levy immediately to discuss very important matters.	Asad Tr. IV, 1049:18-1050:1; Ling Decl. ¶ 12, *see* e-mail dated April 29, 2002, a true and correct copy is attached hereto as Exh. B to the Ling Decl.
72. As of May 3, 2002, Asad had not communicated with Ms. Levy or Mr. Ling, or otherwise responded to Mr. Ling's April 29 messages to Mr. Asad.	Asad Tr. IV, 1051:24-1052:2.
73. On May 3, 2002, Mr. Ling terminated Asad's employment for his insubordination; specifically, Asad's failure to: (1) comply with Ms. Levy's direction regarding the layoff, and (2) contact his manager despite both Ms. Levy and Mr. Ling's instruction to do so.	Ling Decl. ¶ 13; *see* e-mail dated May 3, 2002; a true and correct copy is attached hereto as Exh. C to the Ling Decl.

Asad's EEOC Complaint

74. Asad filed his EEOC complaint on October 28, 2002.	*See* EEOC complaint dated October 28, 2002; a true and correct copy is attached hereto as Exh. F to the Burkholder Decl.

Issue No. 2: IBM is entitled to summary adjudication of plaintiff's second cause of action for tortious conduct in violation of public policy — age discrimination, retaliation and wrongful discharge because the challenged employment actions were not adverse employment actions and/or were taken for legitimate, non-discriminatory reasons, and plaintiff cannot prove pretext.

UNCONTROVERTED FACTS	EVIDENTIARY SUPPORT
75. Uncontroverted Facts Nos. 1 to 74 are incorporated herein by reference.	The evidence in support of Uncontroverted Facts Nos. 1 to 74 are incorporated herein by reference.

Issue No. 3: IBM is entitled to summary adjudication of plaintiff's third cause of action for breach of implied contract because Asad was an at-will employee and there was good cause for termination (namely insubordination).

UNCONTROVERTED FACTS	EVIDENTIARY SUPPORT
76. Asad was an at-will employee.	*See* About Your Job booklet, pages 3-4, dated September 2001; a true and correct copy is attached hereto as Exh. E to the Burkholder Decl.
77. IBM's employee handbook states: "Employment at IBM may be ended by the employee or IBM at any time with or without cause. . . No employee or representative of the company is authorized to enter, on behalf of IBM, into any employment arrangement or agreement contrary to the foregoing, except the Senior Vice President of Human Resources, in writing.	*See* About Your Job booklet, pages 3-4, dated September 2001; a true and correct copy is attached hereto as Exh. E to the Burkholder Decl.

78. Asad has not produced in this litigation any written agreement or other document signed by IBM's Senior Vice President of Human Resources, in writing.	Burkholder Decl. ¶ 9.

Issue No. 4: IBM is entitled to summary adjudication of plaintiff's fourth cause of action for breach of the covenant of good faith and fair dealing because Asad was an at-will employee and there was good cause for termination (namely, insubordination).

UNCONTROVERTED FACTS	EVIDENTIARY SUPPORT
79. Uncontroverted Facts Nos. 76 to 78 are incorporated herein by reference.	The evidence in support of Uncontroverted Facts Nos. 76 to 78 are incorporated herein by reference.

Defendant IBM's Conclusions of Law

1. Even if Asad can prove a prima facie case of age discrimination or retaliation, the Court should still grant summary judgment because IBM had legitimate, non-discriminatory reasons for the termination and for not immediately placing Asad in an executive position. *Guz v. Bechtel Nat'l. Inc.*, 24 Cal. 4th 317, 355-56 (2000)(affirming summary judgment in favor of employer on age discrimination claim).

2. Asad cannot prove a claim for wrongful discharge in violation a public policy because he cannot prove all of the following: (1) he was employed by IBM; (2) IBM discharged Asad; (3) Asad's termination was a violation of public policy; and (4) the termination caused Asad harm. *See* CACI 2430. For the reasons set forth in Section I, Asad cannot sustain his burden.

3. Plaintiff cannot prove a prima facie case of retaliation. The elements of title VII and CFEHA claims require that (1) the plaintiff establish a prima facie case of retaliation; (2) the defendant articulate a legitimate nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal termination. *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992). To establish a prima facie case, the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action. *Id.*

4. There is a strong inference that since Ms. Pensock promoted Asad, she would not discriminate against him shortly thereafter. Under the "same actor" doctrine, "where the same actor is responsible for both the hiring and firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." *Horn v. Cushman & Wakefield Western. Inc.* 85 Cal. Rptr. 2d 459, 467 (1999) citing *Bradley v. Harcourt. Brace & Co.*, 104 F.3d 267, 270-271 (9th Cir. 1996).

5. Asad cannot go to trial based on assumptions and speculations. *Fairbanks v. Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (defendant's burden on summary judgment is merely to point out through argument that the plaintiff lacks evidence sufficient to prevail at trial; burden then shifts and the plaintiff "may not rest upon mere allegations" but must set forth admissible evidence and "the specific facts showing there is a genuine issue for trial"). "The mere scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party.] "Evidence that is merely colorable or is not significantly probative," is not sufficient to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 252, 106 S. Ct. 2005, 91 L. Ed. 2d 202 (1986).

6. In order to rebut IBM'S legitimate, non-discriminatory reasons for Asad's termination and its decision to not immediately promote him to an executive level position, the burden shifts to Asad to produce *substantial evidence* that the employer's stated reasons were untrue or pretextual or that the employer acted with a discriminatory animus. *See Hersant v. Dept. of Social Services*, 57 Cal. App. 4th 998, 1004-5 (1997); *see also Steckl v. Motorola. Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)("[plaintiff] failed to produce any specific, substantial evidence of pretext and that age was a determining factor in the decision"); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981). A plaintiff cannot establish pretext by merely showing that the "employer's decision was wrong or mistaken" or that the employer is not "wise, shrewd, prudent or

competent." *Hersant*, 57 Cal. App. 4th at 1005. Rather, to avert summary judgment, plaintiff must proffer "substantial responsive evidence" that the employer's reason is pretextual for discrimination. *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 225 (1999).

7. Asad's personal opinions about his own qualifications cannot establish pretext. *Horn v. Cushman & Wakefield Western Inc.*, 72 Cal. App. 4th 798, 816 (1999) (plaintiff's "subjective personal judgments" concerning her competence did not raise a genuine issue of material fact).

8. When an employer claims to have hired or promoted one person over another on the basis of qualifications, *the question is not which of the aspirants was better qualified, but, rather, whether the employer's stated reasons for selecting one over the other were pretextual.* In a rare case, the disappointed applicant may be able to prove pretext by showing that she was in fact better qualified than the individual selected. But that is an uphill struggle: *in the absence of strong objective evidence (e.g. test scores), proof of competing qualifications will seldom, in and of itself; be sufficient to create a triable issue of pretext. Rathburn v. Autozone. Inc.*, 361 F.3d 62, 74 (1st Cir. 2004) (emphasis added) (citations omitted).

9. Federal Courts are not a venue for disgruntled employees to vent their gripes. Courts have held that: "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' [*Blackie v. State of Me.*, 75 F.3d 716, 725 (1st Cir.

1995)] If every minor change in working conditions or trivial action were a materially adverse action then any 'action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' [*Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)] *Thomas v. Dept. of Corrections*, 77 Cal. App. 4th 507, 510-11 (2000).

10. "A mere thereat of termination, however, is not an adverse employment action. It had no effect on the terms, conditions, or duration of employment." *Helgeson v. American International Group. Inc.*, 44 F. Supp. 2d 1091, 1098 (S.D. Cal. 1999). *See also Rizzo v. Sheahan*, 266 F.3d 705, 718 (7th Cir. 2001)("[W]e find that the threats [of termination], phone calls and inconveniences [plaintiff] faced at work" did not constitute adverse employment actions because they did not actually alter the terms and conditions of employment).

11. In California, employees are presumed to be at will unless they have an employment agreement for a specified term. *See Cal. Lab. Code* § 2922; *see also Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 676-77 (1988). Absent such an agreement, "the relationship is terminable at any time without cause." *Foley* 47 Cal.3d at 680.

12. Other district courts have determined that IBM is an at will employer based on the language in its employee handbook. *See Rodriguez v. IBM*, 960 F. Supp. 227, 231-232 (1997); *see also Johnson v. IBM*, 89 1 F. Supp. 522, 525-526 (1995).

13. Longevity--even when accompanied by good reviews, promotions or salary increases--does not change an at-will status into one terminable only for cause. *Kovatch v. California Casualty Mgmt. Co.*, 65 Cal. App. 4th 1256, 1276 (1998) ("[P]ositive performance reviews, commendations, salary increases, and vague assurances that [plaintiff] would become a sales manager was not sufficient to create a triable issue of facts as to whether the parties had implicitly agreed [defendant's] right to terminate [plaintiff] would be limited"). *overruled on other grounds in Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826 (2001); *Miller v. Pepsi-Cola Bottling Co.*, 210 Cal. App. 3d 1554, 1559 (1989) (affirming summary judgment on claim brought by an 11 year employee: "Promotions and salary increases are natural occurrences of an employee who remains with an employer for a substantial length of time. These factors should not change the status of an 'at will' employee to one dischargeable only for 'just cause'").

14. The covenant of good faith and fair dealing is designed to effectuate the intentions and reasonable expectations of parties reflected by mutual promises within the contract. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683-84 (1988). If an employee is at-will, the implied covenant cannot decree otherwise. *Guz v. Bechtel Nat'l Inc:*, 24 Cal.4th 317, 348-53 (2000).

15. Good cause for termination can properly be determined upon a motion for summary judgment. *Moore v. May Dep't Store Co.*, 222 Cal. App. 3d 836, 840 (1990); *Fowler v. Varian Associates*, 196 Cal. App. 3d 34, 42-43 (1987).

16. Insubordination and failure to follow company policy and procedure constitutes good cause. *Moore v. May Dep't. Stores Co.*, 222 Cal. App. 3d 836, 838-39 (1990).

17. Asad's allegations before October 28, 2001 are barred by the statute of limitations. Under *Cal. Gov't Code* § 12960, "No complaint may be filed after the expiration of one year from the date upon which the unlawful practice or refusal to cooperate occurred." *See Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031, 1040 (2002)(Court held any conduct occurring prior to one year before the filing of the administrative complaint cannot serve as the basis for liability unless some exception to the one-year limitations period applies).

DATED: June 6, 2005

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP

BY /s/
Allison L. Burkholder
Attorneys for Defendant
International Business Machines
Corp.

[stamp]

IT IS SO ORDERED

DATE 8/31/05

/s/
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SA CV 03-1743 AHS (ANx)

[Filed August 31, 2005]

SYED ASAD,	)
Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL BUSINESS	)
MACHINES CORPORATION, etc.,	)
Defendant.	)
	)

JUDGMENT

Defendant's motion for summary judgment or, in the alternative, partial summary judgment came on regularly for hearing before the Court, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the matter having duly heard and considered and decision having been duly rendered,

IT IS ORDERED AND ADJUDGED:

that plaintiff shall take nothing from defendant, that the action shall be dismissed with prejudice, and that defendant shall recover its costs of suit.

Dated: August 31, 2005

/s/
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

APPENDIX D

STATUTES

28 U.S.C. § 1332

United States Code
Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 85. District Courts; Jurisdiction

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the

same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection —

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which —

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of —

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is

substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) —

(A)(i) over a class action in which —

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant —

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each

defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which —

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated

by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim —

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the

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[1] So in original. Probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which —

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply —

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441

United States Code
Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 89. District Courts; Removal of Cases from State Courts

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if —

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be

removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective,

the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.